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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

THE UNITED STATES OF AMERICA, *Petitioner,*

v.

RALPH RAYNOR, *Respondent.*

THE UNITED STATES OF AMERICA, *Petitioner,*

v.

CHETT FOWLER, *Respondent.*

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR REHEARING.

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Respondents heretofore filed their petition respectfully requesting this Honorable Court to grant a rehearing of the above entitled cause. The petition and the discussion of the questions presented thereby clearly direct attention to what we earnestly believe constitutes error in the reasoning of and in the conclusions drawn by the court in its majority opinion.

With all due respect for the views expressed by the court we, after a full consideration of the opinion rendered feel

constrained to insist that the conclusions reached are not warranted by the law or the particular facts in the case. We know there can be no pride of opinion in the mind of the Court, but that the sole purpose is to reach a just and proper decision in this particular case. With this idea in mind, we beg to present our views, hoping thereby to be of some aid to the Court and at the same time to obtain for Respondents a rehearing and correct what they believe to be error.

I.

Let us consider the case in the light of the charges contained in the indictment. The first count charged defendants with violating that section of the statute, pertaining to the making of impressions "such as could be used in the making of counterfeit money" (R. P. 71). Under this count the court admitted a large amount of evidence as shown by the testimony of the witnesses Clarence Cones (R. Pp. 11 to 19), and Thomas A. Gallagher (R. Pp. 19-51), which become wholly incompetent and prejudicial to defendants, for at the conclusion of all of the evidence, counsel for defendants moved for a directed verdict of "not guilty" as to Count No. 1 (R. Pp. 71-72). This motion was granted (R. p. 72), the court stating

> "I think the evidence fails to show that the impressions that were made by these defendants are such impressions as could be used for that purpose. It is more of a transfer of the ink from one paper to another and could not be used for the making of money to pass as genuine money. Therefore, under that situation it becomes my duty to direct that you return a verdict of not guilty so far as the first count is concerned." (R. P. 72)

In view of this ruling all of the evidence received from the two witnesses named in relation to count No. 1 became incompetent in so far as it related to the charge contained in count No. II, yet the court failed to direct the jury to

disregard this evidence when they came to consider count II. The court merely said:

> "That the action of the court in this regard should not influence you any in arriving at your verdict in count II, which is having in their possession paper similar to that used by the U. S. Government and which may be used for the purpose of making money." (R. 72)

The jury, therefore, was permitted to consider the mass of incompetent testimony with relation to defendants having in their possession at the time of arrest, to illustrate Exhibits Nos. 1 and 2, the reverse impressions of the face and back of a $20.00 note (R. 28), Exhibit 7 which purports to be a leather case with some colored fluid in it; Exhibit 8 consists of some metal pans, in which fluid was mixed; Exhibit 9 which is a rubber coated metal roller; Exhibit 10 a mortar and pestel; Exhibit 11 a graduate tube for measuring fluids; Exhibit 12 a graduate flask; Exhibit 14 a stack of blotters (R. P. 37); Exhibits 16 and 17 purported to be glass plates used in a transfer process; Exhibit 20 a medicine dropper; Exhibit 21A a test tube; Exhibit 22 an alcohol lamp; Exhibit 23 a bottle of unidentified fluid; Exhibit 24 a bottle of after-shaving lotion; Exhibit 25 unidentified white crystals; Exhibit 27 a roll of absorbent cotton (R. Pp. 39-40-41).

The witness Gallagher was permitted in great detail to describe movements and operations of the defendants in attempting to transfer impressions by the use of money with the exhibits named.

With count No. 1 stricken, not a particle of all of this mass of testimony, covering more than a hundred pages of typewritten matter, was competent; but it was thoroughly prejudicial, and could not help but convey to the jury the thought that defendants were charged with counterfeiting, a subject not charged in the indictment. This testimony was all objected to, overruled and admitted, and was in the highest sense incompetent and prejudicial to the

defendants who were, after the dismissal of count No. 1, being tried only on count No. 2. If the defendants had been charged in a proper count with an offense of obtaining money by trick or by fraud, which, under some statutes, constitutes obtaining money under false pretences and in others the offense of grand larceny, this testimony would have been competent yet it was received and considered by the jury in determining whether the defendants were guilty of having in their possession and under their control "distinctive paper which had been adopted by the Secretary of the Treasury of the United States for the obligations and other securities of the United States, and did have in their possession a similar paper adapted to the making of such obligations and other securities, without the authority of the Secretary of the Treasury, or other proper official of the United States." (R. 3) In other words, this evidence, as suggested, could not help but lead the jury to believe that the defendants were being tried for counterfeiting by using some common white paper, capable of being purchased in any stationery store upon which some useless impressions were made.

If defendants were guilty of any offense whatever, it was a violation of a state statute for the obtaining of money by "cheat or fraud" designated by some states as obtaining money under false pretences, or larceny by fraud. That this was the wrong-doing of the defendants, if any, is conclusively shown by the testimony of the Government witnesses; first, Clarence Cones, a counterfeiter and ex-convict and under-cover man for the Government (R. 11) testified "Raynor said he and two other persons had developed this system of swindling to a fine degree and that they could not be touched by law * * * (R. 13).

> Ques. Now, state whether or not the defendant Raynor or the defendant Fowler, either one or both, indicated to you, or said to you whether they were going to actually reproduce by $10,000. * * * * * all of this $10,000.00 worth of money that Hallowell was going to bring in for Carl Smith.

Ans. No, they had no intention to reproduce the $10,000.00.

Ques. Did they tell you what they intended to do?

Ans. Yes.

Ques. What did the defendant Fowler and the defendant Raynor tell you they intended to do if they got the $10,000.00?

Ans. He explained to me that they would take the supposed victim and show him to such an extent that would thoroughly convince him that they could reproduce a genuine bill and, then, when he was thoroughly convinced, he would produce his $10,000.00 and through some sort of slight-of-hand performance, or otherwise, they would steal the $10,000.00 and make away wth it. (R. 13-4)

Again, Cones testified that when "Fowler came to my farm and gave me five one dollar bills, indicating which one Raynor would reproduce. Fowler said that when Raynor asked for my money to reproduce I was to take those out of my pocket and lay them on the table so that he could sort through them and take out the one he wanted. Four were old bills and Fowler said that Raynor would pick out the other, which was the newest one." (R. 14)

This affirmative testimony given by the Government stands uncontradicted. That it was a cheat and fraud which was sought to be perpetrated was further shown by the witness Gallagher who described the fake operation of the defendant Raynor in an attempt to make reproduced impressions of various bills, no one of which, according to this witness, could be used for money. Again, the impressions could be and were made on ordinary white paper, not even similar to or adapted for government obligations or securities. The impressions were made in reverse and in order to deceive anyone would have to be changed, "and in the present form, there is not anything about that which could deceive anyone into thinking it was money." (R. 45)

In other words, the entire demonstration made by the defendants before Gallagher, the supposed intended vic-

tim, was simply a fake to induce him to produce $10,000.00, in accordance with alleged plan of the government undercover man Cones, when he accompanied defendant Fowler to Evansville to see Carl Smith and pretended to get him to put up $10,000.00 on this confidence game, so that the money could be "switched" and stolen according to the plan detailed by Cones "that they would take the supposed victim and show him to such an extent that it would thoroughly convince him that they could reproduce a given bill and then when he was thoroughly convinced, he would produce his $10,000.00 and then through some slight-of-hand performance or otherwise, they would steal the $10,000.00 and make away with it". (R. 14)

That this was the plan could not be denied. The government's evidence conclusively demonstrates it. To perpetrate this fraud "distinctive" government paper "adopted" by the Secretary of the Treasury for use in producing government "obligations or securities" was not necessary. Any common white paper was sufficient. This was conclusively demonstrated by Exhibits 1 and 2, used for the purpose of making impressions, and which the witness Gallagher, as well as the Government expert Burton, testified was common ordinary paper, having no distinctive characteristics or similarity to the Government adopted paper. It cannot be supposed that the proposed victim had any knowledge of the character of this "distinctive" government paper, its quality, its adaptability, or that it had been adopted by the Secretary of the Treasury.

We, therefore, insist that the trial court erred in receiving the testimony referred to and in failing to withdraw it from the consideration of the jury when count No. 1 was dismissed. Defendants specifically objected to all of this testimony and assigned the court's rulings as errors in their grounds for appeal (Par. 13, R. 85) and in assignment of error VII (R. 90) independent of the other errors relied upon. Defendant insists that these rulings justify a reversal of the verdict of the jury and an affirmance of the

decision of the Circuit Court of Appeals, especially in view of the undisputed government testimony showing that the offense committed, if any, was an attempt to obtain money by cheat or fraud, and not charged in the indictment.

II.

The Government in seeking a reversal of the Circuit Court of Appeals, urges that the Court erred; (a) in construing the provision of the statute to relate only to genuine government paper, or paper which the government would use in printing its own obligations; (b) in holding that the statute did not apply to any paper not impregnated with a red or blue silk fibre, no matter how similar in appearance it might be to genuine government paper; and (c) in reversing the Trial District Court. (Brief P. 8.)

In effect, these specifications present but one question, the construction of the statute under which defendants were convicted. In reviewing the case, this Honorable Court limits its consideration to this one question and in so doing, we earnestly believe erred. That there is an honest diversity of opinion as to the construction, purpose, and meaning of this statute is shown by the fact that but two cases have ever reached the Appellate Courts, involving this statute.

In *Krakowsky* v. *U. S.*, 161 Fed. 88, decided March 10, 1908, the three Judges were unanimous in upholding the construction for which we contend. In the present case two of the three Judges of the Circuit Court of Appeals concurred in the ruling of the Krakowsky case and in this court three of the justices dissented. In other words, eight judges considering the statute involved, sustained defendants' position.

Under these circumstances, can it be wondered that the defendants earnestly urge a rehearing, particularly in view of the palpable error committed by the Trial Court, as shown in the discussion under the first sub-heading of this Brief.

Let us, however, consider the majority opinion. Reference is first made to the Act of October 12, 1837.[1]

This act furnishes no guide for the construction of that portion of Section 150, under which the defendants are being prosecuted. The 1837 Act does not make "the custody or possession of any paper adopted to the making of bank notes and similar to the paper upon which any such notes shall have been issued," an offense. It is only where it is in the custody or possessed, *with the intent to use* such paper for forgery or counterfeiting any of the notes issued. It is the criminal intent with which it is held in custody or possessed which constitutes the offense. The possession of similar paper, adapted to making the bank notes was not an offense. It was only when possessed for the express purpose of committing a felony, by either forgery or counterfeiting the lawful notes.

The language quoted in the opinion is only a part of section 11 of the Act and supplements provisions, relating to the custody or possession of engraved plates, or blank engraved notes, with intent to use either in forging or counterfeiting any of the government notes issued. In other words, the Act relates entirely to protecting the Government against forgeries and counterfeiting, the criminal intent in each instance constituting the gravaman of the offense.

The Court next directs attention to the fact that the Act of 1837 was subsequently re-enacted in 1847, in 1857, 1860 and 1861. These Acts are quoted in full in the Appendix to the Government Brief at pages 41 to 50. An examination of each of these Acts shows that the language is almost identical with the language used in the Act of 1837. The sole purpose being to prevent the forging and counterfeiting of Government notes and to punish any person having custody or possession of metallic engraven plates, or blanks engraved and printed, after the similitude of any notes issued, or the possession, or custody of any paper adapted to the making of such notes and similar to the paper on which the

[1] C. 2, Sec. 10-11, 5 Stat. 201-203.

notes shall have been issued "with intent to use, or cause, or suffer the same to be used in forging or counterfeiting, etc."

It will thus be observed that in each of these Acts, the sole purpose was to prevent forgery and counterfeiting and the intent with which the plates, blanks, or paper was possessed was the controlling factor.

From 1860 until 1864, several statutes were passed, but an examination of each of them discloses the fact that they were all enacted for the express purpose of punishing forging or counterfeiting government notes or securities, or wrongfully possessing paper, plates, or other material, with the intent to use, cause, or suffer the same to be used in the forging or counterfeiting of any of the notes issued by the Government.

Thus in Section 12 of the Act of December 17, 1860,[1] any person who shall falsely make or forge or counterfeit treasury notes, pass, alter, or publish government notes and obligations is guilty of a felony, while Section 13 again carries the language of the Act of 1837 and provides that the custody or possession of paper adapted to making of government notes, such as have been issued "with intent to use such paper, or cause, or suffer the same to be used in forging or counterfeiting shall be guilty, etc."

By this Act, there is no change from the previous existing statutes.

The Act of February 25, 1862,[2] contains the provisions of the pre-existing law and aims directly at meeting the question of forging, counterfeiting, or altering government notes and obligations. This Act slightly enlarges the previous statute, but does not change in any sense the meaning. It punishes one having custody, or possession of "any paper adapted to the making of such notes, bonds, coupons, or other securities and similar to the paper upon which any such notes, bonds, coupons, shall have been issued with in-

[1] C. 1, Sections 12-13, 12 Stat. 123.
[2] C. 33, Sections 6-7, 12 Stat. 345.

tent to use such paper, or cause, or suffer the same to be used in forging or counterfeiting any of such notes, bonds, or coupons, or other securities".

Here, the words "bonds" and "coupons" and "other securities" are added to the previous statute, but it requires again the criminal intent to constitute the offense for having custody or possession of the paper referred to.

The Act of July 11, 1862[1] does not re-enact any words.

The Act of February 12, 1862 makes the July Act apply to the established Act insofar as the latter Act is not inconsistent with the former. Here again, there is no change with respect to intent, or the unlawful Acts prohibited.

The Court's opinion states that the amendment to the Act of 1863[2] "struck vigorously at all who in any manner trafficked in such imitation paper."

The Section relating to the matter under discussion provides, that "the provisions and penalties of said 6th and 7th Sections shall extend and apply to all persons who shall imitate, counterfeit, or make, or sell paper such as that used, or provided to be used for the fractional notes, prepared in the Treasury Department."

The Sections referred to only makes it an offense where one intends to "imitate, counterfeit, make, or sell the paper." This Act does not change the pre-existing statute, insofar the intent necessary to constitute the offense, is concerned.

We respectfully insist that the Court erred in its interpretation of the Act of June 30, 1864.[3] The opinion states that "Congress once more re-enacted the 1837 Act and made it a more effective weapon against counterfeiters. The element of intent was stricken from the offense and the mere unauthorized possession of imitation paper was made a crime." (Opinion, P. 3)

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[1] C. 142, Sections 5-6, 12 Stat. 532.

[2] C. 73m, Section 8, 12 Stat. 709.

[3] C. 172, Secs. 10-11-12, 13 Stat. 218.

By Section 10 of that Act, it is provided "that if any person or persons shall falsely make, forge, counterfeit, or alter, or cause, or procure to be falsely made, forged, or counterfeited, or altered, any obligation or security of the United States," etc., would be guilty.

While Section 11 makes it an offense for a person to have control, or custody of plate or plates, prepared by the direction of the Secretary of the Treasury, or who shall knowingly suffer the same to be used for the printing of government obligations or securities, except under the direction of the Secretary of the Treasury, or other proper officer, or with any other intent, or who shall have in his possession metallic engraved plates in the similitude of any from which government obligations shall be printed with the intent to use, or suffer the same to be used, shall be guilty.

The Section then contains other provisions, relating to the use of these plates, or aid in printing, photographing, or doing various other acts, "or shall have, or retain in his custody, or possession after a distinctive paper shall have been adopted by the Secretary of the Treasury for obligation or other securities of the United States, any similar paper adapted for the making of such obligation, or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States" etc., shall be guilty.

Reading the latter provision in connection with the preceding statements contained in this section shows clearly that this custody or possession of the "distinctive" paper relates back to the statements where these various matters are used or possessed "with intent to use such plate or plates, or caused, or suffered the same to be used in forging, or counterfeiting any such obligation or other security".

In other words, the Section contains but one sentence, separated by commas, and semi-colons, showing that the entire Section must be construed together and that its sole purpose was to prevent the use of the prohibited matters, or the custody, or possession of a "distinctive" paper, from

being used for forging, or counterfeiting, government obligations, and that it was the intent to use or possess the plates, paper, or other material for forging, or counterfeiting the government's obligations or securities.

Again, in analysing Section 11, it will be noted that the first provision relates to the possession for the purposes of printing obligations, or other securities of the Government and, next, for the engraving of plates in the likeness or similitude of plates designed for printing such obligations, and with the bringing into the United States from any foreign places any plates, except under the direction of the Secretary of the Treasury, or other proper officer "with any other intent or for any other purpose" than that they should be used for the printing of the government obligations.

The Section next specifically provides that any one who shall have the control, custody, or possession of metallic plates engraved with intent to use such plates in forging, or counterfeiting, such obligations or securities, or should not have such plates in his possession, except under the authority of the Treasurer.

Next, it is provided that, if a person shall intend to sell, or otherwise use any engraved similitude, or shall print the same, would be guilty of the offense.

In other words, if the possession of the plates, or the use thereof, for the sale of the same must be with the intent of forging or counterfeiting, can it be said that any different rule would apply in possessing the "distinctive" paper which has been adopted by the Government?

This entire Section is aimed at one thing and that is to prevent forging and counterfeiting of government obligations. If the offense is created, and intent is required in the one instance, why not in the other?

Congress in the passage of this Act was doing nothing more than carrying out the intent which had prevailed in the previous enactments and was not in any sense relaxing the rule with respect to counterfeiters, but was making still defi-

nite and certain what constitutes the offense of forging or counterfeiting.

We earnestly contend that this Provision of the Statute does not eliminate the question of intent. In this Section for the first time does the Statute refer to the custody, or possession of a "distinctive paper", after the same shall have been adopted by the Secretary of the Treasury.

The fact that that Act provides for "distinctive paper" which has been adopted by the Secretary of the Treasury clearly shows that it must be the "custody or possession" of this particular paper which constitutes the offense, if the possession is with the intention of using it in the making or producing of "obligations or securities" of the United States, which would constitute therefore forgery or counterfeiting.

It cannot with reason be contended that if one becomes possessed with this "distinctive paper" that he would thereby be guilty. His possession or custody would have to be wrongful and, under any circumstances, with the purpose or intention of using it in an unlawful manner, that is in forgery or counterfeiting the "obligations or securities" of the United States. If this reasoning is correct, then to make the offense a criminal act, the intention to wrongfully use it would have to be shown.

While the Court casually referred to and in part quoted from the various legislative enactments down to 1864, no attempt was made by the Court to quote the various Congressional reports from the Committees having charge of these enactments either in the House or the Senate. In the Opinion rendered nothing is presented to show that the construction adopted was ever even suggested by either branch of Congress. Mere reference to the Statute does not show the legislative intent or construction placed on the statute in question in this action.

If a rehearing is granted an opportunity will be afforded to check and present these reports to the Court and thereby obtain the full history of these enactments and enable the

Court to more correctly determine the legislative intent, and thus reach a proper construction of the Act in question.

The Act of 1864 just described was carried over into Section 5430 of the Revised Statute without any change insofar as the Act under consideration is concerned. These Provisions were finally by the Act of March 4, 1909, embraced in the Criminal Code.[1] The Statute now under consideration in almost the identical language has been in force and effect since 1864 and the discussion and analyses of the Act of 1864 applies with equal force to the present Section 150.

As was so clearly pointed out in the Opinion rendered by the Circuit Court of Appeals, there are seven (7) paragraphs in Section 150, all intended to protect the "obligations and securities" of the United States.

> In the first paragraph it is the use of the prohibited article; in the second it is the making of a plate in the likeness of a government plate; in the third it is the selling or bringing into the United States of any prohibited plate with the intent that it be used for a purpose other than the printing of government obligations; in the fourth, it is the possession of the prohibited plate with the intent to use in counterfeiting such obligations; in the fifth, it is the having possession of a spurious obligation with the intent to sell or use same; in the sixth, it is the making or selling of the prohibited article. In the seventh paragraph, the one under consideration, it is the possession of paper similar to that adopted by the government and adapted to the making of government obligations that has made the offense.[2]

The evidence offered both by the Government and Respondents showed that the paper possessed by the Defendants is in common use. It is on sale by every dealer and possessed by thousands of citizens. Paper of the kind used

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[1] C. 321, U. S. C., Title 18, Secs. 148-155, 35 Stat. 1088-1115-1117.

[2] 80 Fed. 2nd 472.

by the Government in printing currency and its obligations and securities is of a distinctive type in that it is impregnated with red and blue silk fibre, a feature not present in commercial paper. It is not for sale by any merchants and cannot lawfully be purchased or possessed, except by the authority of the Secretary of the Treasury or other proper officers. It is faithfully guarded by the Government from the moment of its manufacture until it is released for circulation as government obligations.

It is the possession of paper thus suitable for and adapted to the making of genuine obligations that Congress was outlawing. The Government admits that the paper possessed by the Defendants did not contain the silk fibers. For the Defendants to be guilty it would be necessary for the government to prove (a) that the paper possessed by Defendants was a distinctive paper adopted by the Secretary of the Treasury (b) that Defendants had in their possession a similar paper ~~to~~ that adopted by the government and adapted to the making of government "obligations or other securities" (c) that the possession was not under the direction of the Secretary of the Treasury or some other proper officer of the government.

The evidence conclusively shows that the paper possessed by the Defendants was not the distinctive type adopted by the Secretary of the Treasury and that it was not adapted to the making of valid government "obligations or other securities." We will hereafter briefly refer to the evidence upon which we base the foregoing statments.

But one small piece of paper, known as Exhibit 3, was relied upon by the government for a conviction. Exhibits 1 and 2 upon which impressions were sought to be made and the only paper, according to the government's witnesses Cones and Gallagher, which were used by Defendants, and were not similar to the "distinctive" government paper. These Exhibits were on plain, ordinary, white paper and did not possess any of the claimed characteristics of the

government's Exhibit 28, the "distinctive" paper adopted by the government.

Exhibit 3 was one small piece of white paper, cut the size of genuine United States currency. (R. 30)

Exhibits 1 and 2 were used for the making of impressions and as stated by the witness Gallagher, Exhibit 3 was placed between Exhibits 1 and 2. (R. 30)

The witness was then asked if Exhibit 3 was similar paper to that adapted for use in making government obligations and securities. He answered, "I would say yes." * * * I would say that it is similar. * * * It is the size of genuine currency. It is bond paper. The paper used by the government is of a bond type, the feel and crackle of it, which are distinguishing features, are similar and it has *on the surface* curls of red and blue, which resemble distinctive red and blue fibers which are impregnated into genuine government currency paper." (R. 31-32)

> Mr. Jeffrey: As I understand it, your Honor, the only Exhibit, now, on the question of similar paper is that Exhibit 3, isn't it? The other Exhibits, the papers that were seized, are none of them in evidence?
>
> The Court: How about the two on which the impression was made? Was there some evidence that they were similar paper? Those were Exhibits 1 and 2 weren't they?
>
> Mr. Pfister: Yes sir.
>
> The Court: Did you testify to the similarity of that paper?
>
> Mr. Pfister: I was not asked as to that.
>
> The Court: Mr. Gallagher, I hand you Government's Exhibits 1 and 2 and ask you whether or not the paper bearing those impressions is similar to that adopted by the Secretary of the Treasury of the United States for the making of obligations and securities of the United States, and whether or not that paper is adapted to that use.
>
> Ans. In my opinion it is not.
>
> The Court. Then, the one Exhibit is the only one.
>
> Mr. Pfister: That is right, your Honor. (R. 42)

Nevertheless while Exhibits 1 and 2 were used by Defendants in attempting to make impressions to deceive the witness Gallagher, it is not contended that the paper was similar to that adopted by the government.

On Cross-Examination, when the witness Gallagher was asked concerning Exhibits 1 and 2, he stated, that "neither one of them is of any paper that is adapted to government use. Government Exhibit 3 differs from Defendants' Exhibits 1 and 2 in that it is impregnated with the distinguishing feature of government paper, the first distinguishing feature, which is the red and blue curls. * * * By looking at them I can tell they are drawn on the surface of the paper. * * * I think they might be ordinary blue marks with a blue pencil, but I would not state that positively. I could tell by tearing the paper whether they are silk threads." (R. 47-8)

Ques. Well now, do you undertake to tell the jury that one of those pieces of paper, which you have here, may not be adapted to use as a Government obligation, but, by putting some of those red and blue marks on them, that adapts them to the use?

Ans. This piece was apparently adapted by that simple expedient.

Ques. What is the difference between Government's Exhibit 3 and Exhibits 1 and 2? Is it the same quality and type of paper as either Exhibit 1 or 2?

Ans. Well, it is part rag bond paper, which crinkles in the same way. As to chemical content, I couldn't answer that.

Ques. Well, then, you don't undertake to testify at this time what kind of paper that Government's Exhibit 3 is, do you?

Ans. No.

Ques. You haven't had it analyzed?

Ans. I have not.

Ques. And you don't know what the rag content is?

Ans. That is right. (R. 48)

Ques. Mr. Witness, I would like to have you take Exhibit 3 and make such a test, or any test, you wish, to determine whether those are silk fibers or crayon marks, or what they are.

Ans. I should like to have a pin.

The Court. Whatever examination you want to make, Mr. witness.

The witness. With a pin, you could lift out the silk fibers. That is about the best way to test it.

A pin was furnished and the witness then answered:

"I have dug into the paper on one of the lines, and find that it is not solid matter; it is something on the surface of the paper."

Ques. It hasn't any silk thread in there?

Ans. It isn't a thread. (R. 50-1) * * * It is a surface line of some sort. The Government does not use any paper for printing its currency and bonds unless the paper has silk threads in it."

Government's Witness Burton was asked in relation to Exhibit 3, and after comparing it with Exhibit 28, genuine government paper, he stated that the first thing noticeable in Exhibit 3 was red and blue lines on the surface. That while it had some characteristics, similar to currency paper and had a rattle which goes with a bond paper and that most any bond paper could be used for the printing of securities but bond papers do not have red and blue fiber.

On Cross Examination, the witness described the government distinctive paper and stated that the silk threads are not put in there to keep it together and keep it from going limp when it becomes wet, but to identify it.

Ques. Then, under your definition, you can go into any bookstore or place where they sell a good high quality bond typewriting paper and purchase paper which is, or can be, adapted to the making of Government obligations? Is that true?

Ans. Yes sir.

Ques. Would it in its present form be adapted, or what, if anything, would be necessary to adapt it to making Government obligations?

Ans. A good high grade bond paper, without a water mark, could be made distinctive with red and blue lines, in some way, and would then be suitable and adaptable for the manufacture of government securities which would pass in the ordinary run of commerce, I believe.

Ques. Does the Government ever print any money or bonds or obligations on that type of paper that you would get in a bookstore?

Ans. They print it on only the one kind because it is the distinctive paper that is legally required for the printing of government securities.

Ques. If any other company or book store undertook to sell any of this paper, which they have in stock and which is a good quality of bond typewriting paper, to the Government for the printing of Government obligations, the Government would not buy it, would it?

Ans. No, sir.

Ques. Why.

Ans. Because it did not have the control of their guards at their mill and it doesn't have the red and blue silk fiber.

Ques. And that paper would not be adapted to making government oligations? Is that right?

Ans. Not without the red and blue fiber or line.

Ques. But the Government would not use any paper like that for printing obligations would it?

Ans. No. Sir. * * *

Ques. What I am trying to ask is this: If the red and blue marks did not appear on Government's Exhibit 3, then it would not be a paper adapted to the making of Government obligations, would it?

Ans. You could print them on it, but you could tell that it was not the Government paper by the fact that there were no red and blue marks on it.

Ques. Well, then, it would not be adapted to making Government obligations, would it?

Ans. You could print them on it and get just as good an impress and just as good a printing quality. * * * but you could immediately tell that it was not without the red and blue lines on it. It is adaptable in that you can print just as good on it.

Ques. There is not any paper that can be adapted to the making of obligations of the United States unless it conforms to the standard set by the Secretary of the Treasury, is there?

Ans. Well, in my mind, the term "adaptable" means that it can be adaptable in some senses and not in others. It cannot, if it is not absolutely adaptable—

adaptable in every respect to the manufacture of currency.

Ques. The Secretary of the Treasury has set a standard for paper, which he requires to be used in making obligations of the United States? Is that true?

Ans. Yes, sir.

Ques. Now, the Government Exhibit 3 would not conform to that standard unless it had some red and blue marks on, would it?

Ans. No, sir. * * * If the marks on Exhibit 3 were erased then it would not be suitable or adaptable for making Government obligations, according to the standard set by the Secretary of the Treasury.

The witness was handed the original indictment and examined the printed sheet, with reference to the quality and then in answer to Counsel said "It was a good grade of rag bond and, having in mind the regulations and requirements of the Secretary of the Treasury, which have been adopted, the first sheet of the indictment is similar to the "distinctive" paper of the Government in many respects, and could be made adaptable to making Government obligations by the addition of red and blue marks of some sort by pencil, or otherwise.

Ques. And you make that statement in spite of the fact that the regulations of the Secretary of the Treasury require that this distinctive paper have silk red and blue threads in it?

Ans. Yes, sir. (R. 61-2)

The testimony quoted, in our judgment, conclusively shows that it was wholly insufficient to justify the verdict of guilty, and it was for this reason that Defendants in their motion for a new trial assigned the insufficiency of the evidence to support the verdict, and that this question was properly preserved, as stated in the grounds for appeal and in the Assignments of Error.

The Government's undisputed testimony showed that the Defendants were endeavoring to obtain money by a trick and a fraud. There was no attempt to possess paper

adapted for the making of Government "obligations or securities". The mere fact that one of the defendants stated that they had Government paper was only in keeping with their plan to trick and defraud the parties out of their money, if it was produced so that any ordinary paper would answer the purpose they had in mind.

There mere statement of witness Gallagher that in his opinion the Exhibit was similar to the paper used by the Government amounted to nothing when he demonstrated before the jury that the marks upon the Exhibit "might be ordinary blue marks made with a blue pencil".

And when asked by Counsel for the Defendants to demonstrate that it was only a mark and not a fiber in the paper, he conclusively demonstrated it with a pin point and said it was not a silk thread but "it is a surface line of some sort and the Government does not use any paper for printing its currency or bonds unless the paper has silk threads in it."

The expert Burton stated while the Exhibit had certain characteristics which goes with "bond paper and that most any bond paper could be used for the printing of securities, the bond paper did not have red and blue fiber". This witness, however, in his apparent desire to aid the Government, attempted to contend that a good high grade bond paper, without water marks, "could be made distinctive with red and blue lines in some way and might pass in the ordinary run of commerce". He was then forced to admit that such paper would not be used by the Government and that any paper not having the silk fiber would not be adapted to the making of Government obligations, so that if the paper in question is a bond paper that can be bought in any stationery store, we cannot conceive of evidence of that kind being sufficient to justify a verdict of guilty.

Under this evidence, there was no proof that the Defendants possessed distinctive paper, adopted by the Secretary of the Treasury, or that they had in their possession "a similar paper to that adopted by the Government and adapted to the making of Government obligations and se-

curities". If the Defendants possessed a large quantity of paper, similar in appearance to the distinctive paper of the Government and that they were endeavoring through some chemical process to "doctor" the paper so that it would have the permanent red or blue lines, such as exists in the distinctive Government paper and, there was further evidence that this similar paper was attempting to be used for the purpose of defrauding the Government, then there might be some basis for the contention that the Defendants were in the possession of similar distinctive paper, adapted for governmental use.

Reference was made by the Court to the dissenting Opinion of Judge Linsley in the Circuit Court of Appeals when he said, after an examination of the marks on Exhibit 3, that he could not tell whether "they are woven in the fabric or traced". With all due respect to the learned Judge, if he had with the same care, read the testimony of the Government witness Gallagher, he would have found that the marks were but pencilled tracings and this he demonstrated before the jury with a pin point. And that the Government's expert, Mr. Burton, said it was a surface mark.

We certainly trust that this Exhibit is before this Honorable Court and if not, that it can be called for as it was presented to the Circuit Court of Appeals.

We earnestly ask for an examination of this Exhibit for it would surely demonstrate the absurdity of the contention that this ordinary bond paper, with a few straggling pencilled marks on it is "similar" to the "distinctive paper" adopted by the Secretary of the Treasury and adapted for use in the making of Government obligations and securities.

III.

In view of the legal discussion of the questions presented in connection with the Petition for Rehearing and the numerous authorities cited by Counsel for Respondents in their Briefs before this Court, we have confined the arguments in this Supplemental Brief largely to a discussion

of the facts in the case in relation to the Statute under which they are being prosecuted, fully believing that a careful examination of the Record will disclose that the evidence was insufficient to warrant the verdict rendered.

As we have shown by the evidence of the Government's witnesses, the offense, if any was attempted to be committed, was not a violation of the Provisions of Section 150 of the Criminal Code, but, constituted a violation of a State Statute in relation to obtaining money by "trick or fraud."

The testimony is undisputed that what was attempted was purely a confidence game, in which false representations were made with respect to the ability of the Respondents to, by impressions, produce United States currency, in order that they might have their victim produce $10,000.00 and make a switch of packages, thereby becoming possessed of the legal $10,000.00, stealing it and, to use the language of the witness, "getting away with it". It simply was an attempt to stage an old game.

As shown by the use of Exhibits 1 and 2, it was clearly demonstrated that any common bond or typewriting paper would answer their purposes. This was the character of paper actually used in the demonstrations made.

The fact that Respondents may have attempted to perpetrate a fraud furnishes no justification for convicting them of an offense they did not commit. If, for the sake of argument, we assume that the construction of the Statute by the Court in its majority Opinion was correct, nevertheless, as we have demonstrated, the Trial Court clearly erred in respect to the matters discussed in the first subdivision of this Brief, and that as shown by the discussion in subdivision II, the evidence is insufficient to sustain the verdict, even if the interpretation of the Statute given by this Honorable Court is applied to these facts.

CONCLUSION.

In conclusion, we respectfully request that this Supplemental Brief may, by this Honorable Court be considered in connection with the Petition and Argument heretofore presented for a rehearing, and that the Court grant such rehearing and affirm the judgments of the Circuit Court of Appeals.

Respectfully submitted,

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P. 4

SUPREME COURT OF THE UNITED STATES.

Nos. 146, 147.—October Term, 1937.

146	The United States of America, Petitioner, *vs.* Ralph Raynor.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
147	The United States of America, Petitioner, *vs.* Chett Fowler.	

[January 3, 1938.]

Mr. Justice Black delivered the opinion of the Court.

Respondents were convicted in a federal district court for violating a provision of Section 150 of the Criminal Code,[1] which reads:

"whoever shall have or retain in his control or possession after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States, shall be fined not more than $5,000, or imprisoned not more than fifteen years or both."

The Circuit Court of Appeals reversed,[2] holding that the act did not prohibit the possession of any except the distinctive paper adopted by the Treasury, and that other paper was not prohibited even though it closely resembled the distinctive paper and was well suited for successful counterfeiting. The court accordingly believed that the evidence did not support a conviction.

The evidence disclosed that:

> In 1928, the Secretary of the Treasury adopted a distinctive paper for obligations and securities of the United States; this paper was a high grade rag bond having a sharp rattle, very little gloss, and short fine silk fibers distributed throughout; in 1936, respondents had possession of paper of practically the same color, weight, thickness and appearance as this distinctive government paper and cut to the dimensions of twenty dollar government obligations; respondents' paper rattled like genu-

[1] 18 U. S. C. A., Sec. 264; 35 Stat. 1116.

[2] 89 F. (2d) 469; certiorari granted, 301 U. S. —.

ine money; it did not have red and blue silk fibers throughout, but red and blue marks were so expertly designed upon its surface that one judge, dissenting below, after a careful examination of these marks with a magnifying glass, was still wholly uncertain whether they were actually woven in the fabric or were traced on the surface.

Did respondents' possession of this paper violate the act?

The paper was not only perfectly adapted for counterfeiting, but it is difficult to conceive of its use for any other purpose. The history and language of the act are both of importance in determining whether Congress intended to make it a crime to possess, without authority, so close an imitation of the genuine paper adopted by the Treasury.

1. The history of the law under which respondents were convicted dates from a special session of Congress in 1837. That Congress was called upon to pass legislation to meet emergency conditions following crop failures, general business distress, unemployment and discontent. Urged to action by these conditions, Congress authorized the issue of a then unprecedented amount of treasury notes. It had long been a criminal offense to make, utter, or pass counterfeit money. Realizing that the protection of the currency required more stringent laws against counterfeiters,[3] Congress made it a crime to possess any plate, blank note, or paper to be used for counterfeiting purposes.[4] This early forerunner of the present act provided in part:

"If any person . . . shall have in his custody or possession *any paper adapted to the making of bank notes, and similar to the paper upon which any such notes shall have been issued,* with intent to use such paper . . . in forging or counterfeiting any of the notes issued as aforesaid . . . such person . . . shall be sentenced" etc.

This original provision prohibited the possession of "similar" paper adapted to making "bank notes" but such "bank notes" ob-

[3] Counterfeiting increases in periods of commercial distress, unemployment, and poverty. Even prior to 1837, poverty contributed to offenses against the currency, see *Re:* Halmagh Ackerman, 5 N. Y. City Hall Rec. (1820) 140, and counterfeiters kept paper in their possession which was used for making counterfeit obligations, *Re:* Guy Johnson and William Johnson al. William Price, John Strickland, and Edward O'Melly, 5 N. Y. City Hall Rec. (1820) 138. In 1837 the prospect of increased counterfeiting—due to distressed economic conditions and the fact that non-federal agencies, both public and private, had already put a large amount of paper in circulation—indicated the need recognized by Congress in strengthening the law. See, Dewey "Financial History of the United States", Longmans, Green & Co. (N. Y.) 1915, p. 233. See Knox, "United States Notes", Scribner's (N. Y.) 1899, p. 40 *et seq.*

[4] Act of October 12, 1837, c. 2, Secs. 10, 11, 5 Stat. 201, 203.

viously were to be forged or counterfeit—not genuine. This first act thus prohibited—not the genuine—but counterfeit paper, intended to be made into counterfeit obligations, and its language and meaning were substantially reenacted in 1847, 1857, 1860, 1861 and 1862.[5]

Beginning December, 1860, Congress, to meet imperative needs, again authorized great increases in government obligations. By July, 1862, new issues of currency and unsettled conditions had so stimulated counterfeiting that Congress made special funds available to detect and punish those guilty of the crime.[6] Such action proved inadequate to curb counterfeiters, and in 1863, Congress reenacted, strengthened and strongly reinforced the 1837 prohibition against possession of paper for counterfeiting.[7] The 1863 law made it a crime to "imitate, counterfeit, make or sell any paper such as that used, or provided to be used by the fractional note." Although the law had prohibited the possession of paper imitating the genuine since 1837, this 1863 amendment struck vigorously at all who in any manner trafficked in such imitation paper.

By July, 1864, the government had outstanding approximately two billion dollars in war obligations, and the counterfeiter had become a still greater public enemy. Under these circumstances, with more currency to be issued, and the necessity for protection from counterfeiters greatly accentuated, Congress once more reenacted the 1837 act[8] and made it a more effective weapon against counterfeiters.[9] The element of intent was stricken from the offense and the mere unauthorized possession of imitation paper was made a crime. Congress also combined the phrase "paper adapted to the making of bank notes" with the phrase "similar to the paper upon which any such notes shall have been issued." It is the phrase re-

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[5] Act of January 28, 1847, c. 5, Secs. 9, 10, 9 Stat. 118, 120; Act of December 23, 1857, c. 1, Secs. 12, 13, 11 Stat. 257, 259; Act of December 17, 1860, c. 1, Secs. 12, 13, 12 Stat. 123; Act of July 17, 1861, c. 5, Sec. 10, 12 Stat. 259, 261; Act of February 25, 1862, c. 33, Secs. 6, 7, 12 Stat. 345, 347, 348.

[6] Act of July 11, 1862, c. 142, Sec. 5, 12 Stat. 533.

[7] Act of March 3, 1863, c. 73, Sec. 8, 12 Stat. 709, 713.

[8] Act of June 30, 1864, c. 172, Secs. 10, 11, 12, 13 Stat. 218, 221, 222.

[9] In the period preceding this enactment there was again a marked increase in counterfeiting. "There is reported to be in circulation throughout the United States, at the present time, over three thousand issues of counterfeit, spurious, raised and altered bank bills—an average of two issues to every bank in operation. Supposing each issue would average one thousand bills, which is a moderate calculation, there would be three million counterfeit bills in circulation; and the cry is, still they come!" Reedy, "The Universal Bank Note, Draft and Check Detector," New Orleans, 1858, p. 15. This growth resulted in alarming injury to the currency. "Annual Report, Ass'n. of

sulting from this combination—"*similar paper adapted to making such obligations*"—which was construed by the court below to limit the prohibited paper to the genuine Treasury-adopted paper. These phrases, carried in the law from 1837 to 1909, had obviously referred to any paper suitable for counterfeiting. If the Congress of 1864 did intend by combining these phrases to exempt from the act all who had possession of imitation paper, it thereby deliberately weakened the chance of the government to convict and punish counterfeiters. We do not impute such a purpose to Congress. By the change made in 1864 Congress undoubtedly intended to make the law a more effective weapon against counterfeiters. Indeed, two days after this amendment was passed Congress authorized a special appropriation to detect and punish counterfeiters.[10] It is beyond belief that Congress intended to relax the law against counterfeiters at a time when the nation was engaged in financing a war. Such a construction would be neither logical nor reasonable. The section now under consideration is plainly the culmination of a long series of legislative acts, each of which has declared it to be a crime to have possession of paper, counterfeiting the distinctive paper, and suitable to be made into counterfeit obligations. Each change since 1837 was intended to make the possession of counterfeit paper more dangerous for counterfeiters.

Finding nothing in the history of this law which supports the construction given it by the court below, we proceed to an examination and analysis of the particular language believed to justify that construction.

2. That particular language is the phrase "*similar paper adapted to making such obligations.*" The word "similar", and the phrase "adapted to making such obligations or securities", both describe the type of paper the possession of which is prohibited. The definitions given by the court below to this word and this phrase are irreconcilable.

Banks for the Suppression of Counterfeiting," Boston, 1859. After 1860, counterfeiting increased steadily. *Id.* 1860; *id.* 1862. "Specie payments were suspended on December 28, 1861. The war was carried on chiefly by the use of Treasury notes as a circulating medium." Knox, *supra*, p. 84. See Hepburn, "A History of Currency in the United States." MacMillan (N. Y.) 1915, pp. 179-204. However, by October 1862, it was reported that counterfeiting was widespread in America and uneasiness was being felt among Americans about the genuineness of the treasury and other notes issued by the United States. "The Bankers Magazine," London, Vol. XXII, p. 615 (1862). Improved means of preventing counterfeiting in order to maintain public faith in the currency became of great importance.

[10] Act of July 2, 1864, c. 210, Sec. 3, 13 Stat. 351.

That court defined "similar" to mean "somewhat alike"; "not exactly alike"; "like, but not exactly the same." "Similar paper", thus defined, cannot be identical with the distinctive paper adopted by the government, because while the two papers would be "somewhat alike", they would not be "exactly alike" or "exactly the same." Similarity is not identity, but resemblance between different things.[11] Under this definition, "similar paper", the possession of which is prohibited, is not identical with, but differs from the distinctive paper.

However, after giving this definition to similar paper (which is prohibited by the act), the court below concluded that the phrase "adapted to making such obligations" limits the prohibition of the act to the distinctive paper. This conclusion is not consistent with the determination that "similar"—also describing the paper prohibited—designates paper which is different from the distinctive paper. A construction that creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the act, and will carry out the intention of Congress.[12]

There is no inconsistency in the act unless it is assumed that the word "obligations" refers to genuine obligations only. Since words that have one meaning in a particular context frequently have a different significance in another,[13] it is necessary to consider the context of the words "such obligations", in order to determine their significance. The provision of law here construed is the last of seven separate offenses set out in one paragraph of a chapter of the Criminal Code entitled "Offenses against the Currency." The provisions of this chapter were enacted to prevent and to punish counterfeiting. Six closely connected companion offenses are set out in the same section with the offense charged against respondents and all either penalize the possession of, or trafficking in, counterfeit obligations or the materials and devices used to make such obligations.

Examining the context of the words under consideration we find that the word "obligations" appears throughout the Chapter relating to offenses against the currency, and does not always apply to "genuine" obligations, but may, and often does refer to "coun-

[11] Greenleaf *v.* Goodrich, 101 U. S. 278, 282, 283. See, Rhode Island Hospital *v.* Olney, 16 R. I. 184; 13 Atl. 118.

[12] New Lamp Chimney Co. *v.* Ansonia Brass & Copper Co., 91 U. S. 656.

[13] Porto Rico *v.* Lorenzo, 222 U. S. 481; Lamar *v.* United States, 240 U. S. 60; Atlantic Cleaners & Dyers *v.* United States, 286 U. S. 427.

terfeit'' or ''spurious'' obligations. In order to distinguish between counterfeit and genuine instruments, the provisions in some instances specifically designate notes as ''false, forged or counterfeited'' as in Section 149. On the other hand, Section 152 makes it a crime for any person, without authority, to make tools to be used in printing ''any kind or description of *obligation or other security of the United States now or hereafter authorized by the United States.*'' Although these quoted words are ''any kind of . . . obligation . . . authorized by the United States'', the reference is not to genuine obligations, but to counterfeit obligations, not only printed ''without authority'' but printed with counterfeit tools made by the counterfeiter. It is apparent from the context that in this instance the phrase ''obligation . . . authorized by the United States'' refers to a counterfeit obligation. Both before and since the 1837 act words such as ''bills'', ''notes'' and ''obligations'' have been used as meaning counterfeit instruments.[14]

The relative positions of the words we are examining are important. The first word describing the prohibited paper is ''similar.'' Unless the paper possessed is ''similar'' to the distinctive paper of the government, its possession is not prohibited. Genuine obligations can only be made from the genuine distinctive paper, with a genuine design; with genuine lithographing; and with genuine signatures. Conversely, counterfeit obligations would be the result of designs, lithographing, signatures or paper—not genuine,

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[14] As illustrative, the following extracts from cases involving offenses against the currency refer to false or counterfeit instruments: ''When a man has the possession of the number of *notes* alleged in the indictment, with an intention of uttering and passing them for the fraudulent purpose expressed, he has done all that, in words, is necessary to constitute the offence.'' Commonwealth *v.* Sylvanus Cone, II Mass. Reports, 131 at 134 (1806); ''Without mentioning any other differences, it is sufficient to observe, that to constitute the crime described in the former, the possession of at *least ten bills is necessary* . . .'' Murry Brown *v.* The Commonwealth, 8 Mass. Reports, 59 at 71 (1811); ''Bowdain Brastow, was indicted and tried for passing a *$10 bill of the Merchants' Bank.* . . .'' *Re:* Halmagh Ackerman, *supra*, p. 140 (1820); ''In the same place, they found a copper-plate press, a plate for engraving *$2.00 bills on the Merchants' Bank*, and under the roller of the press, *a bill* of that description recently struck off.'' *Re:* Guy Johnson & William Johnson al. William Price, John Strickland and Edward O'Melly, *supra*, p. 138 (1820); cf. State *v.* Randall, 2 Vt. (Aiken) 89, (1827); (cf. Baldwin *v.* VanDeusen where it is stated: ''In reference to bank-bills, bills of exchange, promissory notes and securities for money, the natural and general, if not the universal, antithesis or opposite of genuine, is 'counterfeit.' Hence we say of a bank bill it is a *genuine bill*—i. e., not a counterfeit bill. . . .'' 37 N. Y. Rep. at 493, (1868)); see, Wiggains *v.* United States, 214 Fed. 970 at 971; ''*The bonds* admittedly belonged to the plaintiff in error.'' Forlini *v.* United States, 12 F. (2d) 631 at 634; '' . . . appellant visited the basement while counterfeiting operations were in progress and participated in conversations as to the appearance of the bills that were being made and the

but merely "similar" to the genuine. When, therefore, Congress used the words "similar paper" it included within its prohibition an imitation or counterfeit of the genuine paper. The effect was the same as though it had prohibited possession of a government obligation bearing a signature "similar" to the signature of the Secretary of the Treasury. After the appearance of the word "similar," subsequent words descriptive of the prohibited paper require a construction that will give effect to the Congressional intent to prohibit the possession of paper which is an imitation or counterfeit of that adopted by the government.

In *United States* v. *Howell*, 11 Wall. 432, this Court construed a similar statute which so far as pertinent provided:

"that if any person shall falsely make, forge, counterfeit, or alter . . . any note . . . issued under the authority of this act, or heretofore issued under acts to authorize the issue of treasury notes or bonds; . . . or shall have or keep in possession, . . . any such false, forged, counterfeited or altered notes . . . (such person) shall be . . . guilty of felony . . ." etc.

The defendant indicted under that statute urged that the words "such . . . notes" referred back to those notes that had been "issued under the authority of this act"; that notes issued under authority of the act were genuine; that the act, therefore, did not prohibit passing or possessing a counterfeit note.

This Court gave credit for the plausibility of such an argument, but said it was:

> "at war with common sense, which assures us that the purpose of the act was to punish the making of counterfeits of the notes and bonds described in this act. . . . We are to give due weight to all of the words employed in describing the instrument, . . . So we speak of a bank note. Now if the paper spoken of is a forgery, it is not a bank note, which means the obligation of some bank to pay money. But here also the mind supplies the ellipsis which good usage allows, and understands that what is meant is a forged paper in the similitude of a bank note, or which on its face appears to be such a note." (pp. 436, 437.)

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necessity of putting more yellow in the coloring;" Nivvelink *v.* United States, 66 F. (2d) 178; "One *bill* was found in his clothes, and he volunteered to show the officers where the rest were. . . . The sole issue was as to whether after Hatlen showed him the *bills*, he co-operated with him in disposing of them . . ." United States *v.* Gates, 67 F. (2d) 885; "The *obligations* were described as United States notes and identified by denomination, series number, and plate numbers." Simon *v.* United States, 78 F. (2d) 454, at 455. The word "banknote" may mean—not a genuine—but a counterfeit obligation. Webster's New International Dictionary (Merriam, 1914) in defining the word "counterfeit" uses as an illustration, "The banknote was a counterfeit."

So, in this case, paper which was in the possession of an unauthorized person and which was merely similar to genuine government paper, could not possibly be adapted to making genuine government obligations. In this statute, the words "similar paper adapted to making government obligations" imply that the similar paper should be adapted to making obligations that purport to be genuine and valid, but are not.

This construction is not inconsistent with a grant of authority to certain officials to permit possession of the prohibited paper. In this same Chapter containing laws to protect the currency of the United States there are other similar grants of authority relating to counterfeiting devices and permission can also be granted to possess the actual counterfeiting instruments or obligations.

The fact that Congress revised and codified the criminal laws after the Court of Appeals in the case of *Krakowski* v. *United States,* 161 Fed. 88, held that the act only prohibited possession of the distinctive paper does not detract from the soundness of this conclusion. One decision construing an act does not approach the dignity of a well settled interpretation.[15] It is not necessary to determine the effect of including this act in the Revised Statutes and the Criminal Code.

We are not unmindful of the salutary rule which requires strict construction of penal statutes. No rule of construction, however, requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope—nor does any rule require that the act be given the "narrowest meaning." It is sufficient if the words are given their fair meaning in accord with the evident intent of Congress.[16] Certainly, if Congress had intended to prohibit only the possession of distinctive paper it would have simply used the words "distinctive paper" instead of the distinguishing words "similar paper adapted to making such obligations."

The evidence does support the conviction of respondents. The judgment of the Court of Appeals is reversed and the judgment of conviction is affirmed.

Reversed.

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[15] For prosecutions under the Act subsequent to the *Krakowski* case, *supra,* see the following cases: United States *v.* Rosen (W. D. Tex.), February 14, 1931; United States *v.* Regsich and Grubich (W. D. Pa.), December 16, 1920; United States *v.* Marchetti (N. D. Ohio), June 18, 1924; United States *v.* Maratea and Plocket (E. D. Pa.), January 21, 1932.

[16] United States *v.* Giles, 300 U. S. 41.

SUPREME COURT OF THE UNITED STATES.

Nos. 146, 147—October Term, 1937.

The United States of America, Petitioner,
146 *vs.*
Ralph Raynor.

The United States of America, Petitioner,
147 *vs.*
Chett Fowler.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 3, 1938.]

Mr. Justice Sutherland, dissenting.

Mr. Justice McReynolds, Mr. Justice Butler and I have reached a different conclusion.

The judicial function, as many times we have been told, does not include the power to amend a statute. And while penal statutes are not to be construed so strictly as to defeat the obvious intention of the lawmaker, nevertheless—"Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses." *United States* v. *Resnick*, 299 U. S. 207, 210.

We think the opinion just handed down undertakes to import a meaning into the pertinent statute at war with its words. That statute requires the existence of four distinct elements before the accused can be held guilty of violating it: (1) the adoption by the Secretary of a distinctive paper for the obligations and other securities of the United States; (2) possession or retention by the accused of "similar paper"; (3) the paper to be "adapted to the making of any such obligation or other security"; and (4) the possession or retention not to be under the authority of the Secretary of the Treasury or some other proper officer of the United States.

The word "similar", it is true, generally indicates resemblance and not exact identity, although in some cases it may mean "identical" or "exactly like." *Fletcher* v. *Interstate Chemical Co.*, 94 N. J. L. 332, 334. The distinction is illustrated by the decision of

the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Fontain,* 127 Mass. 452, 454, where it was held that the words "similar offense" meant an offense identical in kind. The court said, "The word 'similar' is often used to denote a partial resemblance only. But it is also often used to denote sameness in all essential particulars. We think the Legislature intended to use it in the latter sense in the statute we are considering." To determine the precise meaning of the word here, we must turn to the statute. The crucial elements there disclosed are those embraced by clause (2), requiring that the paper possessed or retained be "similar paper" to that adopted by the Secretary, and by clause (3) which requires that the paper be adapted to the making of "such" obligation or security. It is as necessary to give appropriate effect to the latter clause as it is to the former. It is not enough that the paper would be "similar" paper within the meaning of clause (2) standing alone; for it does not stand alone, but is associated with and qualified by clause (3). Nothing is better settled in the law of statutory construction than the rule that words by themselves may have a particular meaning, but that this meaning may be enlarged or restricted when considered in connection with other associated words. And this is more especially true where the associated words supplement and qualify the preceding ones as they do here.

In order to apply the rule, we must ascertain the meaning of clause (3), since that adds the requirement that the similar paper shall be adapted to the making of "such" obligation or security. That is to say, we first must determine the import of the word "such"; and that is disclosed by clause (1), providing for the adoption of distinctive paper for the obligations and securities of the United States. This means, and can only mean, genuine obligations and securities, since it cannot be supposed either that the Secretary, by clause (1), is authorized to adopt paper for any that are not genuine, or that his authority under clause (4) is not alone to permit possession of paper adapted to making genuine obligations but extends to paper which resembles the adopted paper only enough to make it adaptable for counterfeiting those obligations. It follows, necessarily, that it is genuine obligations and securities and not counterfeits of them that are embraced by the word "such" in clause (3).

The provisions of the statute were not meant to cover counterfeiting, or preparations antecedent to counterfeiting. Their whole

purpose was to penalize possession or retention by unauthorized persons of the distinctive kind of paper which the Secretary has adopted for the making of the obligations of the United States; language which, as we have said, necessarily imports genuine obligations, because if not genuine they would not be obligations of the United States at all.

The government, however, takes the view that the statute extends to the possession of paper suitable, not for making genuine obligations, but for *counterfeiting* them. And this view, as we understand it, is also taken by the court in its present opinion. The difficulty with that view, however, is that it requires the introduction of an amendment so that clause (3), instead of reading "adapted to the making of such obligations", etc., will read "adapted to the making of *counterfeits of* such obligations", etc. Such an assumption of legislative power is inadmissible.

That the paper here in question, even if in the hands of the Treasury, was not adapted to the making of genuine obligations, is beyond dispute. The distinctive feature of the paper adopted by the Secretary is the presence of short, fine red-and-blue silk fibers impregnated in and distributed throughout a high-grade rag bond paper. These silk fibers are entirely absent from the paper here in question; and while it might have been used for counterfeiting government obligations, it was not adapted to making the genuine articles. The present decision brings within the reach of the statute every stationer who has in his possession for sale any high-grade rag bond paper, if it is capable of being used for counterfeiting government obligations. For the statute, it will be observed, requires no criminal intent, and nothing beyond mere possession or retention.

The view of the statute which we have expressed was adopted thirty years ago by the Circuit Court of Appeals for the Second Circuit in *Krakowski* v. *United States,* 161 Fed. 88. In the meantime, Congress has left the statute in its original form. The government did not see fit to ask review of the *Krakowski* case, but has apparently acquiesced in it for all those years. This court should not be expected to disregard the established rules of statutory construction in order to remedy a situation which Congress could have cured, and may still cure, by a simple act of legislation. We think the well-reasoned opinion of the court below should be accepted and its judgment affirmed.